Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

LINCOLN ALLEN KEITH,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Texas Court of Appeals, Eighth District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a criminal defendant's Sixth Amendment right to confront the witnesses against him violated when the evidence shows that the State introduced a written confession of a co-defendant without the co-defendant testifying?

Petitioner, Lincoln Keith ("Keith"), respectfully requests that a writ of certiorari be issued to review the judgment of the Eighth Judicial District Court of Appeals of Texas, and the denial of petition for review by the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Eighth Judicial District Court of Appeals of Texas is unpublished but may be found in the appendix herein. The denial of the petition for discretionary review by the Texas Court of Criminal Appeals is unpublished, but may be found in the appendix herein.

STATEMENT OF JURISDICTION

The judgment of the Eighth Judicial District Court of Appeals of Texas was entered on November 26, 1997. The Texas Court of Criminal Appeals denied a timely petition for discretionary review on July 8, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

STATEMENT OF THE CASE

The fundamental question presented by this case is whether a criminal defendant's Sixth Amendment right to confront the

witnesses against him is violated when the State introduces the text of a written confession of a co-defendant, without redaction of any kind, at the trial of the criminal defendant. The defendant objected to the introduction of the confession and to testimony taken therefrom (Record Vol. 36 p. 70, 94; Vol. 42 p. 9; Tr. p. 457-463; Exhibit Vol. Ex. #33). The objection at trial was that the criminal defendant's Sixth Amendment right was being violated because the confessing defendant did not testify, thereby depriving petitioner of the right to cross-examine the co-defendant. This objection was carried to the Court of Appeals in Questions #1 and #2 in the appellate brief, and Question #1 and #2 in the Petition for Discretionary Review presented to the Texas Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE RIGHT OF A CRIMINAL DEFENDANT TO CONFRONT THE WITNESSES AGAINST HIM.

The petition for certiorari should be granted because the opinion below conflicts with this Court's important prior rulings on a criminal defendant's fundamental due process right to confront the witnesses against him, thereby securing a fair trial. The protections afforded by the Sixth Amendment are "... fundamental right, essential to a fair trial" and are made obligatory on the States by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403; 85 S. Ct. 1065; 13 L. Ed. 2d 923 (1965).

This case involves a murder that was allegedly committed by numerous youthful defendants including Petitioner and

another defendant Joshua Humphries. At trial, the police detective sergeant testified that the confession (186 pages) given by Humphries was an essential fact upon which he decided that the Petitioner was involved in the murder, and in fact was the "trigger man." Counsel for Petitioner objected to this testimony. (Record Vol. 36 p. 70) The trial court overruled the objection and allowed further testimony from the sergeant about matters contained in the confession. Counsel specifically stated to the court that they were being placed in the position of having to use the confession to the extent they could to help their defendant. This is the situation recognized in *Lazcano v. State*, 836 S.W. 2d 654 (Tex. App. El Paso — *writ ref'd* 1992).

This Court has enumerated various reasons why the guarantees of a fair trial in the Sixth Amendment (applicable to the states in the Fourteenth Amendment) are "fundamental rights." A criminal defendant should have the opportunity to cross-examine the witnesses against him. This right enables the defendant the opportunity to expose falsehoods and bring out the truth in a criminal case. *Pointer* at 404. When one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumably suspect and must be subjected to the scrutiny of cross-examination. *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 434 (1965) A co-defendant's statements about what the defendant did are less credible than ordinary hearsay evidence. *Bruton v. U.S.*, 391 U.S. 123, 141, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

This Court has recognized instances in which a confession could be used against a defendant, but these cases require that not only the defendant's name be removed from the confession, but that words such as omitted, deleted or mere blank spaces must not be left which might suggest the existence of another. This Court has required that the complete existence of another

defendant must be removed from the confessional evidence. *Richardson v. Marsh,* 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987) None of the safeguards of *Richardson* were afforded this Petitioner.

As Mr. Justice Stewart noted, the right of a criminal defendant to cross-examine the prosecution witness is "one of the fundamental guarantees of life and liberty," and "one of the safeguards essential to a fair trial." This right is as indispensable an ingredient as the "right to be tried in a courtroom presided over by a judge." *Pointer* at 410.

CONCLUSION

The Petitioner in this case did not receive these fundamental rights. It is the right to a fair trial that he seeks from this Court. He does not seek reversal and rendition, merely reversal for a fair trial on the properly admissible evidence, with the right to confront the witnesses against him. By granting the Petition for Certiorari, this Court can correct the unfair trial below, and can ensure that this petitioner's fundamental rights are truly guaranteed.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS, EL PASO, TEXAS DATED NOVEMBER 26, 1997

[SEAL OF THE STATE OF TEXAS]

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

No. 08-96-00048-CR

Appeal from

70th District Court

of Ector County, Texas

(TCR A-24,045) Appellee.

LINCOLN ALLEN KEITH,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

OPINION

This is an appeal from a conviction for the offense of capital murder. After finding Appellant guilty, the jury determined that a probability existed that Appellant would commit criminal acts

of violence that would constitute a continuing threat to society, but mitigating circumstances warranted imposition of a life sentence rather than the death penalty. Accordingly, the trial court sentenced Appellant to imprisonment in the Texas Department of Criminal Justice, Institutional Division, for life. TEX.CODECRIM.PROC.ANN. art. 37.07 1, § 2(g)(Vernon Supp. 1997). We affirm.

FACTUAL SUMMARY

Melanie Green (Green), Josh Humphries (Humphries), and Appellant agreed to kill Rachael Juanita Green (Mrs. Green), who is the grandmother and adoptive mother of fourteen-year-old Green. Mrs. Green had unsuccessfully tried to stop Green and nineteen-year-old Humphries from dating. On the evening of October 18, 1994, Jason Trent heard the trio discussing their plan to kill Mrs. Green. Humphries and Green agreed to give Appellant $400 for killing Mrs. Green. The initial discussion involved a plan to poison Mrs. Green with roach poison. That same evening, Humphries, Appellant, Trent, and two other individuals, Brandi Middaugh and Dale Streckfuss, went to Wal-Mart and stole some latex gloves before meeting Green at the victim's home sometime around midnight. Trent, Humphries, Appellant, Green, and Streckfuss went into the victim's home while Middaugh stayed in the car. Humphries carried the roach poison and Appellant had a .22 rifle. Trent and Streckfuss waited on the stairway while Appellant and Humphries entered Green's bedroom, which was separated from the victim's bedroom by a bathroom. After a few moments, Humphries handed the poison to Streckfuss, stating that they had decided not to use it. Streckfuss and Trent then walked into Green's bedroom. After Green checked to make sure Mrs. Green was still asleep, Humphries and Appellant entered the

victim's bedroom. Trent saw Appellant aim the gun and fire it. Before firing a second time, Appellant said, "I got to shoot her again to make sure she's dead." They turned on the lights and everyone went into the room. When they noticed that Mrs. Green's head was moving a little, Appellant shot her again.[1] Trent told the others that they had to "trash this place" to make it look like a burglary, but Green would not let him touch anything. Trent and Streckfuss returned alone to the car and waited with Middaugh. In a short while, Appellant ran out with the .22 and other guns. When Middaugh asked, "What about the money?", Appellant went back inside of the house. Appellant, Humphries, and Green came out in a short while with the victim's purse. They all went to an apartment and Appellant took what Trent estimated to be $7,000 to $8,000 from the victim's purse. Green kept a watch that Middaugh found in the purse. They burned the gloves they had worn and hid three of the rifles that had been taken from the victim's home. Appellant gave Trent and Streckfuss part of the money and kept the rest. Trent asked Appellant about the $400 payment for killing Mrs. Green, and Appellant said that he told Green to keep it since he had all of the other money. Appellant bought clothes and a car with the money he had taken.

William Lawrence Hutchings testified that Appellant, Trent, and others came to his apartment in the early morning hours in October of 1994. They hurriedly entered the apartment and Melanie Green began pulling money out of a purse. Green counted the money and split it evenly between several people. Hutchings followed Appellant, Trent, Humphries, and Streckfuss into a bedroom and saw them pull latex gloves out

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1. The autopsy revealed that Mrs. Green suffered three gunshots to the head and that any one of them would have been immediately incapacitating and rapidly fatal.

of their pockets and put them in an ashtray. He left the bedroom for a minute and when he returned, he smelled burned plastic and saw the group run to the bathroom and flush the toilet. Appellant later told Hutchings that he couldn't believe he had shot somebody, but that she deserved it because she "was being abusive." He also told Hutchings that he would kill anyone who talked about the murder.

Johnny Wayne Rowton was also at the apartment when Appellant and the others returned in the early morning hours of October 19, 1994. Appellant told Rowton that he "shot Melanie's grandmother in the head three times" and that he had taken her purse. Rowton buried the .22 rifle used in the offense and later assisted law enforcement officers in recovering it. Kevin Wadley testified that Appellant bragged that he shot Mrs. Green three times in the head. At the time of his arrest, Appellant voluntarily admitted that Humphries and Green had given him $400 to kill the victim.

The trial court instructed the jury on capital murder, that is, murder for remuneration, and the lesser-included offense of murder. The court also provided accomplice witness instructions with respect to Trent, Rowton, Hutchings, and Wadley. The jury found Appellant guilty of capital murder as charged in the indictment.

ADMISSION OF CO-DEFENDANT'S STATEMENT

In Points of Error Nos. One and Two, Appellant complains that the admission into evidence of a transcription of a co-defendant's oral statement violated his right to confrontation guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 10 of the Texas Constitution.

The State responds that the evidence is admissible under the rule of optional completeness, TEX.R.CRIM.EVID. 107.

The State questioned Snow Robertson, a detective sergeant with the Odessa Police Department, about his role in the investigation of this case, and in particular, his interview of the codefendant, Josh Humphries. Robertson testified that as a result of the interview, he gained information which led him to take further action in this case. The prosecutor then asked Robertson whether he ascertained that Humphries, Appellant, Green, and others were at the victim's residence at the time of the murder. Appellant objected to Robertson's testimony as hearsay. During a hearing outside the presence of the jury, Appellant repeatedly objected that Robertson's testimony about Humphries' statements was inadmissible hearsay, pointing out that he could not call Humphries as a witness or cross-examine him. The parties debated at length regarding whether Robertson's testimony was admissible under either TEX.R.CRIM.EVID. 803(24) or 801(c)(2)(E). The trial court overruled Appellant's objections and permitted Robertson to testify that he concluded, based upon Humphries' oral statement, that Appellant and others were present at the scene of the murder, and that he focused on one of those individuals as the murderer. Robertson then testified about the arrest of Appellant and his subsequent oral admission that Humphries and Green paid him $400 to kill the victim.

During cross-examination, Appellant questioned Robertson extensively about the tactics the officers employed during the interview of Humphries, and in particular, whether they lied to him. Defense counsel read from a transcription of the interview and questioned Robertson about several statements made by Humphries. On re-direct, the State offered the transcription of

the entire interview into evidence under Rule 107. Appellant again objected that the statement was hearsay and added that its admissibility under Rule 107 was limited to specific matters that were not complete in Robertson's responses to defense counsel's questions. The trial court overruled those objections and admitted the transcription. Robertson then went on to testify that Humphries was arrested for murder, that he obtained an arrest warrant for Appellant and arrested him.

It is well established that the use of a non-testifying codefendant's confession against a defendant deprives him of his constitutional right of confrontation. See Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987); *Richardson v. Marsh,* 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987); *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The State maintains, however, that Appellant opened the door to admission of Humphries' oral statement under the rule of optional completeness by cross-examining Robertson in detail about that statement and by reading selected portions of it before the jury.

Rule 107 provides:

> When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, as when a letter is read, all letters on the same subject between the same parties may be given. When a detailed act, declaration, conversation, writing or recorded statement is given in evidence, any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain

> the same may also be given in evidence. 'Writing or recorded statement' includes depositions.

TEX.R.CRIM.EVID. 107.

Rule 107 permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter "opened up" by the adverse party. *Credille v. State,* 925 S.W.2d 112, 116 (Tex.App. — Houston [14th Dist.] 1996, pet. ref'd); *Johnson v. State,* 747 S.W.2d 451, 453-54 (Tex.App. — Houston [14th Dist.] 1988, pet. ref'd). This rule is properly invoked when an opposing party reads part, but not all, of a statement into evidence. *Livingston v. State,* 739 S.W.2d 311, 331-32 (Tex.Crim.App. 1987), *cert. denied,* 487 U.S. 1210, 109 S.Ct. 2859, 101 L.Ed.2d 895 (1988); *Araiza v. State,* 929 S.W.2d 552, 555-56 (Tex.App. — San Antonio 1996, pet. ref'd). The purpose of the rule is to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing. *Credille,* 925 S.W.2d at 116; *Solano v. State,* 728 S.W.2d 428, 430-31 (Tex.App. — San Antonio 1987, pet. ref'd). When defense counsel pursues a subject that would ordinarily be outside the realm of proper comment by the prosecutor, the defendant opens the door and creates a right of reply for the State. *Credille,* 925 S.W.2d at 116, citing *Parr v. State,* 557 S.W.2d 99, 102 (Tex.Crim.App. 1977).

Appellant cross-examined Robertson in detail about the interview with Humphries. In addition to establishing that Humphries was protective of Green and himself with respect to their involvement in the murder, Appellant questioned Robertson about the techniques he and Investigator B.J. White employed in interviewing Humphries. Appellant read

extensively from the interview in his effort to establish that White and Robertson had lied to Humphries in order to obtain the statement. He also read portions of Humphries' statements about the crime, including a statement that Appellant did not commit the murder. Appellant, nevertheless, argues that his cross-examination should not be viewed as opening the door to admission of the transcribed statement because he undertook the cross-examination in response to the inadmissible hearsay offered by the State through Robertson regarding the conclusions he drew from the interview of Humphries. *See Rogers v. State,* 853 S.W.2d 29, 35 (Tex.Crim.App. 1993)(error is not waived when defendant brings in evidence to meet, rebut, destroy, deny or explain improperly admitted evidence). The State replies that Robertson's testimony of the conclusions he drew is not hearsay because it was not offered for the truth of the matter asserted but rather to establish why he focused his investigation on Appellant as well as others. We agree.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX.R.CRIM.EVID. 801(d). Robertson's testimony of the conclusions he drew from the interview with Humphries was not offered for the truth of the matter asserted, but to explain why Robertson focused his investigation on Appellant and arrested him after obtaining a warrant. *See Jones v. State,* 843 S.W.2d 487, 499 (Tex.Crim.App. 1992)(officer's testimony that he began to suspect appellant after listening to another detective interview a witness, and that he subsequently obtained an arrest warrant for appellant was not offered for truth of the matter asserted, and therefore, was not hearsay); *Oberg v. State,* 890 S.W.2d 539, 542 (Tex.App. — El Paso 1994, pet. ref'd)(officer's testimony regarding information he received

about the defendant-inmate selling drugs was not offered to show truth of the matter asserted but to establish why the officer searched the defendant). Since this testimony was properly admitted, Appellant cannot take advantage of the rule stated in *Rogers*. Accordingly, we conclude that Appellant opened the door to admission of the transcription under Rule 107 by reading portions of it during his cross-examination of Robertson. *See Espinoza v. State, aff'd,* 829 S.W.2d 53, 55 (Tex.App. — Houston [14th Dist.] 1991), *aff'd,* 853 S.W.2d 36 (Tex.Crim.App. 1993)(when counsel introduced portions of the complainant's statement into evidence by reading verbatim selected questions and answers in an attempt to show that the questioner was suggesting answers to the child, the State was entitled to offer the remainder of the statement under the optional completeness); *LeBlanc v. State,* 737 S.W.2d 865, 869 (Tex.App. — Houston [14th Dist.] 1987), *pet. ref'd,* 762 S.W.2d 582 (Tex.Crim.App. 1988)(where defendant questioned detective extensively about a hearsay statement made to him during the course of his investigation, the hearsay statement was properly admitted by the State on redirect examination under rule of optional completeness).

Even if it can be said that Appellant did not open the door to admission of this evidence, the error is harmless under TEX.R.APP.P. 44.2(a) because the jury had before it substantial evidence of Appellant's guilt, including his oral confession in which he admitted killing the victim for $400. Therefore, we conclude beyond a reasonable doubt that the evidence did not contribute to Appellant's conviction or punishment. *See Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726 23 L.Ed.2d 284 (1969)(applying harmless error test to violation of confrontation clause and finding that there was substantial evidence of guilt); *Ortiz Salazar v. State,* 687 S.W.2d 502, 503

(Tex.App. — Dallas 1985, pet. ref'd)(admission of co-defendant's confession was harmless where both defendants gave written confessions, the court deleted any reference to appellant's name in the co-defendant's confession, and the confessions were substantially similar in nature and essentially corroborated, interlocked, and supported each other). Points of Error Nos. One and Two are overruled.

ADMISSION OF APPELLANT'S ORAL STATEMENTS

In Points of Error Nos. Three and Four, Appellant challenges the admission of his oral confession made to Detective Robertson because it is inadmissible under Article 38.22 of the Code of Criminal Procedure. He also relies on the Fifth and Fourteenth Amendments to the United States Constitution. The trial court expressly found in its findings of fact and conclusions of law that Appellant's oral statements were not obtained as the result of custodial interrogation. The evidence at trial reveals that Detective Robertson placed Appellant under arrest and advised him of his *Miranda*[2] rights. Another officer took Appellant outside and placed him in the backseat of a patrol unit while Robertson stayed in the apartment and gathered Appellant's clothes as evidence. When he walked outside, Robertson saw that Appellant, whose hands were handcuffed behind his back, appeared to be in distress and was thrashing and bouncing around in the patrol car. Robertson opened the door and inquired whether Appellant was all right. Appellant blurted out, "I want to talk to you. Melanie and Josh told me they would pay me $400 if I killed her grandmother, and if I kept quiet about it. I just didn't kill her for no reason."

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2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

By its express terms, Article 38.22 does not preclude admission of a statement that does not stem from custodial interrogation or of a statement that is the res gestae of the arrest or of the offense. TEX.CODE.CRIM.PROC.ANN. art. 38.22, § 5 (Vernon 1979); *Morris v. State,* 897 S.W.2d 528, 531 (Tex.App. — El Paso 1995, no pet.). There is no dispute that Appellant was in custody at the time he made the statements. However, Robertson's question "Are you alright?" is not interrogation or its functional equivalent, nor is it the type of question the officer should have known is reasonably likely to elicit an incriminating response. *Rhode Island v. Innis,* 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297, 308 (1980); *Morris,* 897 S.W.2d at 531; *Burns v. State,* 807 S.W.2d 878, 882 (Tex. App. — Corpus Christi 1991, pet. ref'd). Because the oral statements were not obtained as the result of custodial interrogation, the requirements of Article 38.22 are inapplicable and Appellant's rights under the Fifth and Fourteenth Amendments were not violated.[3] Accordingly, the trial court did not err in admitting Appellant's oral statements. Points of Error Nos. Three and Four are overruled.

FAILURE TO PRESERVE EXCULPATORY EVIDENCE

In Point of Error No. Five, Appellant alleges that his right to due process under the United States Constitution was denied because the State failed to preserve exculpatory evidence. The loss or destruction of exculpatory evidence call deny a criminal defendant due process of law. *Lee v. State,* 893 S.W.2d 80, 86 (Tex.App. — El Paso 1994, no pet.). The duty to preserve

3. Due to our conclusion that the statements were not obtained as the result of custodial interrogation, we need not reach the question whether the statements were also admissible as res gestae of the arrest.

evidence is limited to evidence that possesses an exculpatory value that was apparent before the evidence was destroyed. *Lee,* 893 S.W.2d at 86, *citing California v. Troinbella,* 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984); *McDonald v. State,* 863 S.W.2d 541, 543 (Tex. App. — Houston [1st Dist.] 1993, no pet.). Absent bad faith, the mere failure to preserve potentially useful evidence does not of itself result in the denial of due process. *Lee,* 893 S.W.2d at 86, *Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988); *Ex parte Brandley,* 781 S.W.2d 886, 894 (Tex.Crim.App. 1989), *cert. denied,* 498 U.S. 817, 111 S.Ct. 61, 112 L.Ed.2d 35 (1990). To show that the loss of evidence abridged his due process rights, a criminal defendant must demonstrate that: (1) evidence was lost or destroyed by the State after a request therefor; (2) the evidence was favorable to the defendant; and (3) the evidence was material. *Nastu v. State,* 589 S.W.2d 434, 441 Tex.Crim.App. 1979), *cert. denied,* 447 U.S. 911, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980); *Lee,* 893 S.W.2d at 86-87. A showing that the evidence might have been favorable does not meet the materiality standard. *Lee,* 893 S.W.2d at 87; *McDonald v. State,* 863 S.W.2d 541, 543 (Tex.App. — Houston [1st Dist.] 1993, no pet.).

The allegedly exculpatory evidence consists of: (1) the pillow, pillow case, sheet, and mattress from the victim's bed, (2) furniture in the bedroom, (3) the victim's clothes, and (4) a .22 rifle found in the victim's residence. The Sheriff's Department destroyed the pillow, pillow case, and sheet as biological hazards because they had blood on them. The mattress, furniture, and the victim's clothes remained in the residence and were not kept under the control of the Sheriff's Department after the investigation was completed. The rifle found in the residence was not sent to the FBI for testing. There

is no evidence to indicate that any of the law enforcement officers knew that any of these items was potentially exculpatory. Consequently, Appellant has failed to establish bad faith. *Burke v. State,* 930 S.W.2d 230, 236 (Tex. App. — Houston [14th Dist.] 1996, pet. ref'd); *Hebert v. State,* 836 S.W.2d 252, 254 (Tex.App. — Houston [1st Dist.] 1992, pet. ref'd). With respect to the alleged favorable nature of the evidence, Appellant asserts that the items in the bedroom should have been preserved so that he could determine whether other shots were fired which did not strike the victim. If that evidence were found, he reasons that he could have argued that the shots he fired did not strike the victim and that she was instead killed by Humphries and Green with the other weapon. There is no evidence that additional shots were fired by anyone. Appellant's speculation fails to establish that any of these items are favorable and material to his defense. *See Hebert,* 836 S.W.2d at 254 (defendant failed to affirmatively show the bed sheet would have been favorable and material evidence). Point of Error No. Five is overruled.

DENIAL OF MOTION FOR NEW TRIAL

In Point of Error No. Six, Appellant alleges that the trial court erred in denying his motion for new trial because a juror, Max Ford, had a conversation with Detective Robertson and later vouched for the credibility of Robertson during deliberations. At the new trial hearing, the parties stipulated that Ford and Robertson exchanged pleasantries during trial but did not discuss the case. Both Carl Bizzell and Kay Wright, jurors in the case, testified that Ford told the other jurors that he knew Robertson's family well and that it seemed to be a good family. Neither juror viewed Ford's comments as vouching for Robertson's credibility. A third juror, Marzelle

Boyles, testified that she recalled juror Ford attempting to discuss the facts of the case during trial with other jurors, but that everyone just ignored him and walked away. The State introduced controverting affidavits from seven other jurors. TEX.R.APP.P. 21.7 (court may receive evidence by affidavit or otherwise). Each juror stated that no other juror, including Max Ford, influenced his or her decision to return a verdict of guilty, and that the decision to convict was based solely on the evidence that was given in the courtroom under oath and was not based on anything that "may have come out in the jury room during deliberations."

At a hearing on a motion for new trial, the trial judge is the trier of fact and his or her findings should not be disturbed unless abuse of discretion has been demonstrated. *Tollett v. State,* 799 S.W.2d 256, 259 (Tex.Crim.App. 1990); *Powell v. State,* 939 S.W.2d 713, 716 (Tex.App. — El Paso 1997, no pet.). Issues of fact as to jury misconduct raised at a hearing on a motion for new trial are for the determination of the trial judge, and if there is conflicting evidence, the trial court does not abuse its discretion in overruling the motion for new trial. *Tollett,* 799 S.W.2d at 259; *Powell,* 939 S.W.2d at 716. Appellant had the burden to prove his juror misconduct allegation at the hearing on his motion for new trial. *Patrick v. State,* 906 S.W.2d 481, 498 (Tex.Crim.App. 1995).

The Rules of Appellate Procedure provide that a defendant is entitled to a new trial if a juror has talked with anyone about the case. TEX.R.APP.P. 21.3(f); *see Powell,* 939 S.W.2d at 717. If a juror converses with any unauthorized person about a case, injury to the accused is presumed. *McMahon v. State,* 582 S.W.2d 786, 793 (Tex.Crim.App. 1978)(en banc), *cert. denied,* 444 U.S. 919, 100 S.Ct. 238, 62 L.Ed.2d 175 (1979); *Powell,*

939 S.W.2d at 717. This presumption, however, is rebuttable. *Id.* If it is shown that the case was not discussed, or that nothing prejudicial to the accused was said, then the verdict will be upheld. *Id.; Chambliss v. State,* 633 S.W.2d 678, 682 (Tex.App. — El Paso 1982), *aff'd on other grounds,* 647 S.W.2d 257 (Tex.Crim.App. 1983). Here, the parties stipulated that the conversation between Robertson and Ford was casual and consisted mainly of Ford inquiring about the health of Robertson's father. The trial court did not err in denying Appellant's motion for new trial on this ground.

The Rules of Appellate Procedure further provide that a defendant is entitled to a new trial when, after retiring to deliberate, the jury has received other evidence. TEX.R.APP.P. 21.3(f); *Hernandez v. State,* 938 S.W.2d 503, 507 (Tex.App. — Waco 1997, pet. ref'd). Thus, it is jury misconduct for a juror to use his own out-of-court knowledge of a witness's reputation to comment on the witness's credibility. *Stephenson v. State,* 571 S.W.2d 174, 176 (Tex.Crim.App. [Panel Op.] 1978); *Hernandez,* 938 S.W.2d at 507. In order to compel a new trial on this ground, it must be shown that the other evidence was received by the jury and was detrimental to the defendant. *Martinez v. State,* 846 S.W.2d 348, 350 (Tex.App. — Corpus Christi 1992, pet. ref'd). Whether other evidence has been "received" is a question of degree, and a passing remark will not constitute receipt of other evidence. *Martinez,* 846 S.W.2d at 350. Further, it is not mandatory to grant a new trial every time a juror mentions something that is not supported by the evidence. *Baldanado v. State,* 745 S.W.2d 491 (Tex.App. — Corpus Christi 1988, pet. ref'd).

Although Ford informed the other jurors that he knew Robertson's family and they seemed to be a good family, neither

Bizzell nor Wright interpreted Ford's remarks as vouching for Robertson's credibility and they did not testify that it had this effect upon them or the jury as a whole. Further, neither juror testified that the jury discussed Ford's comments about Robertson's family. Boyles testified that the jurors had typically ignored Ford on other occasions when he had attempted to discuss the case prior to the beginning of deliberations. Seven jurors stated that their decisions were based solely on the evidence adduced during trial and not upon any comments made by Ford or anyone else during deliberations. Given the absence of any evidence showing that the jury discussed Ford's comments, the trial court could have concluded that the jury did not receive outside evidence. *See Baldanado,* 745 S.W.2d at 494-95 (where evidence showed that jurors mentioned a publicized case similar to one on trial but did not discuss it, or evidence in that regard was conflicting, trial court did not abuse its discretion in finding that jury did not receive outside evidence). Additionally, the trial court could have found based upon the live testimony and affidavits that Ford's comments had no effect on the jury, and therefore, were not detrimental to Appellant. Appellant has failed to demonstrate that the court abused its discretion in denying the motion for new trial. Point of Error No. Six is overruled.

CORROBORATION OF ACCOMPLICE WITNESS

In Point of Error No. Seven, Appellant challenges the sufficiency of the evidence to corroborate the testimony of the accomplice witness, Jason Trent. When the State relies upon an accomplice witness's testimony, the testimony must be both material and corroborated by independent evidence tending to connect the accused with the offense. TEX.COD.CRIM.PROC.ANN. art. 38.14; *Holladay v. State,* 709 S.W.2d 194, 200

(Tex.Crim.App. 1986); *Gibson v. State*, 908 S.W.2d 314, 315 (Tex.App. — El Paso 1995, no pet.). In reviewing the sufficiency of accomplice witness corroboration, the proper focus is not whether the other evidence standing alone sufficiently establishes the guilt of the accused. *Cox v. State*, 830 S.W.2d 609, 611 (Tex.Crim.App. 1992); *Gibson*, 908 S.W.2d at 315; *Spratt v. State*, 881 S.W.2d 65, 66 (Tex.App. — El Paso 1994, no pet.). Rather, the test to determine the sufficiency of the corroboration is to eliminate from consideration the evidence of the accomplice witness and then examine the testimony of the other witnesses to ascertain if there is inculpatory evidence which tends to link the accused with the commission of the offense. *Cook v. State*, 858 S.W.2d 467, 470 (Tex.Crim.App. 1993); *Gibson*, 908 S.W.2d at 315; *Spratt*, 881 S.W.2d at 67. The corroborating evidence need not directly link the defendant to the crime or be sufficient in itself to establish guilt. *Cook*, 858 S.W.2d at 470; *Gibson*, 908 S.W.2d at 315; *Spratt*, 881 S.W.2d at 67. But if the non-accomplice evidence fails to connect an appellant to the offense, the evidence is insufficient to support the conviction and an acquittal results. *Munoz v. State*, 853 S.W.2d 558, 560 (Tex.Crim.App. 1993); *Gibson*, 908 S.W.2d at 315; *Spratt*, 881 S.W.2d at 67.

Appellant argues that the State failed to corroborate the accomplice with respect to the remuneration element of capital murder. However, the testimony of all accomplice in a capital murder prosecution need not be corroborated as to the elements which distinguish murder from capital murder. *Gribble v. State*, 808 S.W.2d 65, 71 n.13 (Tex.Crim.App. 1990); *Anderson v. State*, 717 S.W.2d 622, 630-31 (Tex.Crim.App. 1986). Thus, we will review the evidence only to see whether there is any non-accomplice evidence which tends to connect Appellant to the commission of this offense.

Trent, who is a co-defendant and charged as a party to this offense, is all accomplice as a matter of law. *Ex parte Zepada,* 819 S.W.2d 874, 875-76 (Tex.Crim.App. 1991), The State correctly notes that a defendant's confession or admissions may be sufficient to corroborate all accomplice witness.) *Romero v. State,* 716 S.W.2d 519, 522-23 (Tex.Crim.App. 1986); *Jackson v. State,* 516 S.W.2d 167, 171 (Tex.Crim.App. 1974).[4] Appellant is connected to the offense by his oral confession that he killed the victim in exchange for the $400 promised him by Humphries and Green. Consequently, this evidence sufficiently corroborates the accomplice witness." *See Garza v. State,* 915 S.W.2d 204, 210 (Tex.App. — Corpus Christi 1996, pet. ref'd)(defendant's confession corroborated the accomplice testimony). Point of Error No. Seven is overruled.

LESSER-INCLUDED OFFENSES

In Point of Error No. Eight, Appellant contends that the trial court erred in failing to instruct the jury of the lesser-included offenses of manslaughter and criminally negligent homicide.[5] The charge included an instruction on the lesser-included offense of murder, which the jury rejected. In

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4. The State also relies on the testimony of Kevin Wadley and Johnny Rowton. However, the trial court's accomplice witness instructions pertained to both Wadley and Rowton. Since Appellant's oral admissions are sufficient to corroborate Trent, we find it unnecessary to further examine whether Wadley and Rowton are not accomplices as a matter of fact so that their testimony could be used to corroborate Trent.

5. With the amendment of the Penal Code in 1994, the offense formerly known as "involuntary manslaughter" is now "manslaughter." TEX.PENALCODEANN. § 19.04 (Vernon 1994).

determining whether Appellant is entitled to a charge on a lesser-included offense, we must consider all of the evidence introduced at trial, whether produced by the State or the defendant. *Banda v. State,* 890 S.W.2d 42, 69 (Tex.Crim.App. 1994); *Contreras v. State,* 915 S.W.2d 510, 520 (Tex.App. — El Paso 1995, pet. ref'd). We apply the two-pronged "Royster test"[6] as modified in *Rousseau v. State,* 855 S.W.2d 666, 672 (Tex.Crim.App.), *cert. denied,* 114 S.Ct. 313 (1993); *Contreras,* 915 S.W.2d at 520. First, the lesser-included offense must be included within the proof necessary to establish the offense charged. *Rousseau,* 855 S.W.2d at 673; *Contreras,* 915 S.W.2d at 520. Second, there must be some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser-included offense. *Robertson v. State,* 871 S.W.2d 701, 706 (Tex.Crim.App. 1993); *Rousseau,* 855 S.W.2d at 673; *Contreras,* 915 S.W.2d at 520. The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in determining whether an instruction on a lesser-included offense should be given. *Banda,* 890 S.W.2d at 60; *Contreras,* 915 S.W.2d at 520. If evidence from any source raises the issue and a jury charge on the issue is properly requested, the issue must be submitted to the jury. *Dowden v. State,* 758 S.W.2d 264, 269 (Tex.Crim.App. 1988); *Contreras,* 915 S.W.2d at 520.

The first prong of the test is met because manslaughter and criminally negligent homicide may be lesser-included offenses of murder, and consequently, of capital murder. *See Tompkins v. State,* 774 S.W.2d 195, 211 (Tex.Crim.App. 1987), *aff'd,* 490 U.S. 754, 109 S.Ct. 2180, 104 L.Ed.2d 834 (1989); *Gadsden v. State,* 915 S.W.2d 620, 622 (Tex.App. — El Paso

6. *Royster v. State,* 622 S.W.2d 442, 446 (Tex.Crim.App. [Panel Op.] 1981)(opinion on reh'g).

1996, no pet.). Under the second prong, we must determine whether there is some evidence in the record, which if true, would permit a jury rationally to find that the defendant is guilty only of the lesser-included offenses. *Contreras,* 915 S.W.2d at 520. A charge on the lesser offense of manslaughter should have been given if there is some evidence that Appellant recklessly, but not intentionally, caused the death of the deceased. TEX.PENALCODEANN. § 19.04 (a person commits manslaughter if he recklessly causes the death of an individual); *Adanandus v. State,* 866 S.W.2d 210, 232 (Tex.Crim.App. 1993). Similarly, the court should have given a charge on the lesser offense of criminally negligent homicide if there is some evidence that Appellant caused the death of the deceased by criminal negligence, but not intentionally or recklessly. TEX.PENALCODEANN. § 19.05 (a person commits criminally negligent homicide if he causes the death of an individual by criminal negligence). Manslaughter requires a finding that defendant was aware of the risk but consciously disregarded it; criminally negligent homicide requires a finding that defendant ought to have been aware of the risk but failed to perceive it. TEX.PENALCODEANN. § 6.03(c) and (d)(Vernon 1994)(definitions of culpable mental states "reckless" and "criminal negligence"); *Ybarra v. State,* 890 S.W.2d 98, 110 (Tex.App. — San Antonio 1994, pet. ref'd). Thus, manslaughter and criminally negligent homicide are mutually exclusive lesser-included offenses of murder. *Saunders v. State,* 913 S.W.2d 564, 572 (Tex.Crim.App. 1995).

Appellant does not point to any particular evidence as raising either criminally negligent homicide or manslaughter. Instead, he argues that if the inadmissible evidence is excluded from consideration, namely, his oral admissions and the transcribed statement of Josh Humphries, he is not guilty of

capital murder and may be guilty of a lesser offense. Appellant cites no authority for the proposition that we must exclude allegedly inadmissible evidence from our consideration in reviewing this point of error. Such an argument is contrary to the requirement that we consider all of the evidence. *Banda*, 890 S.W.2d at 69; *Contreras*, 915 S.W.2d at 520. Further, we have already found that the trial court did not abuse its discretion in admitting these items of evidence. The evidence reflects that Appellant carried a .22 rifle to the victim's home and deliberately shot her three times in the head at close range with the specific intent to cause her death. There is no evidence in the record from which a rational jury could infer that Appellant's actions were merely reckless or criminally negligent and were not intentional. *See Adanandus*, 866 S.W.2d at 232. Appellant did not testify to his mental state nor was there any evidence offered which indicated that Appellant was guilty only of consciously disregarding a substantial and unjustifiable risk or of failing to perceive the risk in aiming at and shooting the deceased. *Compare Lugo v. State*, 667 S.W.2d 144, 147 (Tex.Crim.App. 1984)(testimony that defendant pointed a loaded rifle at wife in an attempt to persuade her to relinquish keys to a car and that gun just "went off" and testimony by defendant that he did not intend to shoot his wife was sufficient to raise lesser-included offense of involuntary manslaughter) *with Dowden*, 758 S.W.2d at 271 (where evidence showed that defendant voluntarily went to the police station and intentionally engaged in a gun battle with the police that resulted in the death of an individual, and there was no evidence that the defendant was acting merely recklessly or with criminal negligence, the defendant was not entitled to instructions on lesser-included offenses). Accordingly, the trial court did not err in refusing the requested instructions. Point of Error No. Eight is overruled.

Appendix A

MOTION TO RAISE BOND

In Point of Error No. Nine, Appellant complains that the trial court violated Article 33.03 of the Texas Code of Criminal Procedure by raising bond at a hearing conducted without the presence of Appellant or his attorneys. Appellant's pretrial bail was set at $250,000. Following receipt of a guilty verdict, the trial court entered an order at 6 p.m. on November 13, 1995 raising Appellant's bond to $500,000. It appears from the record that Appellant never made his pretrial bond and was in custody at the time of trial. Appellant offered no evidence at the hearing on his motion for new trial to establish that the trial court conducted a hearing on this matter or that he and his attorneys were not present.

The State maintains that Appellant's complaint is moot because issues concerning pretrial bail are moot after the accused is convicted. *Henriksen v. State,* 500 S.W.2d 491, 494 (Tex.Crim.App. 1973); *Myres v. Stale,* 866 S.W.2d 673 (Tex.App.Houston [1st Dist.] 1993, pet. ref'd). To the extent Appellant raises a complaint regarding his pretrial bail, we agree. However, we also view Appellant's complaint as alleging that the trial court erred in conducting a proceeding in his absence. Under Article 33.03, a defendant must be personally present at his trial. TEX.CODECRIM.PROC.ANN. art. 33.03 (Vernon 1989). In the absence of any evidence that the trial court conducted a hearing on the State's motion to raise bond, we conclude that the mere entry of an order raising bond is not a proceeding governed by Article 33.03. *See Lawton v. State,* 913 S.W.2d 542, 549 (Tex.Crim.App. 1995)(non-adversarial in *camera* meeting is not a pretrial proceeding within meaning of Article 28.01 or Article 33.03; consequently, defendant's presence was not required); *Chambers v. State,* 903 S.W.2d

21, 30-31 (Tex.Crim.App. 1995)(for purposes of Article 33.03 requirement that defendant be personally present at trial, defendant's "trial" does not include jury panel formation during general assembly); *Malcolm v. State,* 628 S.W.2d 790, 792 (Tex.Crim.App. [Panel Op.] 1982)(where the record was devoid of any evidence that some type of adversarial hearing was held which led to findings of fact and conclusions of law supporting the granting or overruling of a pleading, it contained no evidence of a proceeding within the meaning of Article 28.01). Point of Error No. Nine is overruled.

TRIAL PUBLICITY

In Point of Error No. Ten, Appellant asserts that the trial court erred in failing to grant a mistrial due to trial publicity which occurred when two television crews videotaped a portion of the 220 persons summoned for voir dire and broadcast the videotapes during the evening news. Relying exclusively on *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), Appellant alleges that the filming of the jury panel placed undue pressure on the jury panel and denied him a fair trial. In *Estes,* the Supreme Court held that the defendant was deprived of his right to due process under the Fourteenth Amendment by the televising of his notorious, heavily publicized and highly sensational criminal trial. Appellant seems to read *Estes* as announcing a *per se* constitutional rule that the televising of criminal trials is inherently a denial of due process. This view of *Estes* was rejected by the Supreme Court in *Chandler v. Florida,* 449 U.S. 560, 574, 101 S.Ct. 802, 809, 66 L.Ed.2d 740 (1981). Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. *Chandler, 449* U.S. at 574, 101 S.Ct. at 809. Trial courts

must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law. *Id.* The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case — be it printed or broadcast — compromised the ability of the particular jury that heard the case to adjudicate fairly. *Chandler,* 449 U.S. at 575, 101 S.Ct. at 810. In order to establish a due process violation from trial publicity, a defendant must show that the media's coverage of his case-printed or broadcast — compromised the ability of the jury to judge him fairly, or that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process. *Chandler,* 449 U.S. at 581, 101 S.Ct. at 813. To demonstrate prejudice in a specific case, a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters. *Id.*; *Murphy v. Florida,* 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589(1975). Appellant has made no attempt to show that the brief videotaping of the jury panel prior to voir dire impaired the ability of the jurors to decide the case on only the evidence before them or that his trial was affected adversely by the impact on any of the participants of the news coverage. Point of Error No. Ten is overruled.

ADMISSION OF HEARSAY EVIDENCE

In Point of Error No. Eleven, Appellant contends that the trial court erred in allowing Johnny Rowton to give hearsay testimony about a statement made by Josh Humphries. In addition to his argument that the statement is hearsay, Appellant complains that it is inadmissible character evidence under

Appendix A

TEX.R.CRIM.EVID. *404*. During Rowton's direct examination by the State, the following exchange occurred:

> [The prosecutor]: Do you know anything about that gun being buried in the backyard on East 11th Street?
>
> [Appellant's objections overruled].
>
> [Rowton]: I know why it was buried, because I buried it.
>
> [The prosecutor]: Okay. Why did you bury that gun, Mr. Rowton?
>
> [Rowton]: I buried that gun because Josh had mentioned that Lincoln was going to —
>
> [Appellant's hearsay objection overruled].
>
> [Rowton]: Okay. What I was saying was, I buried the gun because I was told, in other words, that somebody else was going to get hurt and a couple of other people were going to wind up dead. And I figured if I knew where it was and it was buried, and I didn't plan on killing nobody with it, nobody else would get hurt with that gun.
>
> [The prosecutor]: What did Josh say that made you believe that Lincoln Keith might use that gun again?
>
> [Rowton]: Well, ma'am, she was his girlfriend, so he was looking out for his girlfriend, and he heard

> that she might be the next one. So I didn't want to see everybody wind up dead.

In order to present a complaint on appeal regarding the admission of evidence, the record must show that Appellant brought the matter to the trial court's attention by a timely and specific objection or motion to strike, unless the specific grounds were apparent from the context. TEX.R.APP.P. 33.1(a)(1)(A); TEX.R.CRIM.EVID. 103(a)(1); *Williams v. State,* 927 S.W.2d 752, 763 (Tex.App. — El Paso 1996, pet. ref'd). If the trial objection does not comport with the error raised on appeal, the asserted error is waived. TEX.R.APP.P. 33. 1 (a); *Penry v. State,* 903 S.W.2d 715, 753 (Tex.Crim.App. 1995); *Barnes v. State,* 876 S.W.2d 316, 325 (Tex.Crim.App. 1994). Appellant objected to Rowton's testimony on the ground of hearsay, but he never objected to this evidence under Rule 404. Accordingly, this complaint is waived. Further, by failing to object when Rowton continued to testify about the statements made to him by Humphries, and therefore, allowing the same evidence to be admitted without objection, Appellant waived his hearsay complaint, *Ethington v. State,* 819 SW.2d 854, 858 (Tex.Crim.App. 1991); *Gillum v. State,* 888 S.W.2d 281, 285 (Tex.App. — El Paso 1994, pet. ref'd). Point of Error No. Eleven is overruled.

CONSTITUTIONALITY OF ARTICLE 37.071

Finally, in Point of Error No. Twelve, Appellant challenges the constitutionality of Article 37.071 of the Code of Criminal Procedure on its face and as applied to him. In particular, he challenges the constitutionality of the future dangerousness and mitigating evidence special issues. He also complains that the statute allows the jury to use their judgment in a capricious

manner, and allows the State to introduce irrelevant and inadmissible evidence at punishment. Lastly, he asserts that the jury was not allowed to properly consider his mitigating evidence because the trial court denied his requested instructions. Since the jury found that Appellant should receive a life sentence rather than the death penalty due to the existence of mitigating circumstances, the contentions raised in this point of error are moot. Point of Error No. Twelve is overruled.

Having overruled all points of error, we affirm the conviction.

November 26, 1997 /s/ Ann Crawford McClure
ANN CRAWFORD McCLURE,
Justice

Before Panel No. 2
Barajas, C.J., McClure, and Chew, JJ.

(Do Not Publish)

APPENDIX B — OFFICIAL NOTICE FROM THE COURT OF CRIMINAL APPEALS OF TEXAS REFUSING PETITION FOR DISCRETIONARY REVIEW DATED JULY 8, 1998

OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

July 8, 1998
COA#: 08-96-00048-CR
RE: Case No. 0458-98
STYLE: KEITH, LINCOLN ALLEN

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

SCOTT M TIDWELL
P O BOX 1311
ODESSA TX 79760